FUJISHAH (MALAYSIA) SDN BHD

v.

WALLEY METAL WORKS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[COMPANIES (WINDING-UP) NO: D5-28-195-2001]
5 FEBRUARY 2002

COMPANY LAW: *Winding-up - Petition - Companies Act 1965, s. 218 - Agreement to settle debt - Non-payment of balance of debt - Bona fide dispute as to sum claimed - Doctrine of waiver - Whether petitioner waived right to insist strict performance on original sum*

COMPANY LAW: *Winding-up - Opposition to petition - Delay in filing affidavit verifying petition - Companies (Winding-up) Rules 1972, r. 26 - Whether contravened - Whether occasioned injustice upon respondent*

The petitioner had obtained a judgment in default of appearance for the sum of RM567,533.15 ('the original sum') against the respondent. The parties then entered into a settlement agreement whereby the respondent would pay the petitioner a reduced amount of the sum owed in instalments. The respondent did not make the last two payments but paid the petitioner RM20,000. The petitioner applied to this court for a petition under s. 218(1)(e) of the Companies Act 1965 to wind up the respondent on the ground that the latter had failed to settle the original sum.

The respondent opposed the petition on two grounds. Firstly, it was contended that a *bona fide* dispute arose on the debt alleged by virtue of the petitioner accepting the sum of RM20,000. Thus, the petitioner had waived its right to insist on the scheduled instalment payments. Secondly, the defendant questioned the legality of the petition on the premise that the affidavit verifying the petition was not filed within four days, thereby contravening r. 26 of the Companies (Winding-up) Rules 1972.

Held:

[1] A waiver (which does not require consideration) operates as an estoppel to deny the petitioner the right to claim the original sum. (p 104 d)

[2] The respondent need not prove its case conclusively that there had been a waiver on the part of the petitioner. The respondent had sufficiently raised a *bona fide* dispute on the debt claimed by the petitioner by reason that the latter might have waived his right to claim the sum in question by accepting the RM20,000. (p 104 f-g)

[3] It was evidenced that the affidavit was filed some two and a half months from the required four days and the petitioner did not advance any reasons for the delay. (p 103 e)

[4] Time is of the essence in filing the verifying affidavit. The longer the petitioner takes to complete his petition, the more the detriment to the respondent. This delay had caused injustice to the respondent and therefore should not be condoned under r. 194. (p 104 a-b)

[Petition dismissed with costs.]

Legislation referred to:
Companies Act 1965, s. 218(1)(e)
Companies (Winding-Up) Rules 1972, rr. 26, 194

Other source(s) referred to:
Alex Chang Huey Wah, *Companies Winding-Up Handbook (MLJ Handbook Series)*, II, p 76
Chitty on Contracts, General Principles, vol 1, 28th edn, para 23-039
Walter Woon, *Company Law*, 2nd edn, p 684

For the petitioner - BC Tee; M/s Sa'adiah, Khoo, Lo & Co
For the respondent - CS Lam; M/s CS Lam & Co

Reported by M Maheswaran

JUDGMENT

Kang Hwee Gee J:
This is a petition to wind up the respondent company on account of its inability to pay its debt under s. 218(1)(e) of the Companies Act 1965. The debt arose in the following manner:

1. On 14 October 1987 the petitioner obtained judgment in default of appearance against the respondent on 14 October 2001 *vide* Civil Suit D3-23-3012-1987.

2. The respondent did not settle the sum which by 11 September 1993 stood at RM567,533.15.

3. On 11 September 1993 the parties entered into a settlement agreement to settle the judgment debt *inter alia* on the following terms and conditions:

    a. The petitioner waived, the sum of RM217,533.15 from the judgment sum and allowed the respondent to pay only the sum of RM350,000 by nine monthly installments with effect from September 1993. A schedule of payment of the installments is attached to the said settlement agreement.

b. The liability of the respondent will only be fully discharged upon the full payment.

c. In the event of any failure on the part of the respondent to pay any of the installments, the sum of RM217,533.15 so waived will be reinstated back to the defendant's account.

d. The petitioner agreed not to charge any further interest on the sum due except that interest would be chargeable on any overdue installment payments, in which event the petitioner would also have the right to charge interest retrospectively at 12% p.a. on the sum outstanding as at 1 September 1983 and to demand for the full payment of that sum.

e. It is also agreed in the said settlement agreement that time shall be of the essence.

Out of the nine scheduled installments the respondent paid seven installments amounting to RM272,221.60, leaving the two remaining installments for April and May amounting to RM77,778.40 unpaid.

On 20 March 1998 however, following a meeting between the parties the respondent paid to the account the sum of RM20,000 but failed to settle the balance to date.

Accordingly, a statutory notice of demand was issued to the respondent pursuant to s. 218(1)(e) on sums computed as follows:

Sum agreed pursuant to settlement agreement:		RM350,000
Less Payment (9 installments plus RM20,000)		RM292,221.60
		RM 57,778.40
Add amount reinstated due to breach		RM217,533.15
	Total	RM275,311.55
Interest charged according to settlement agreement (12 September 1993 - 10 November 2000) (RM275,311.55 x 12% x 2616/365)		RM236,783.01
	Total	RM512,094.56

The respondent failed to comply with the demand - hence this petition.

The petition was opposed by the respondent *vide* the affidavit of its director Wong Swee Kong.

Substantially, the respondent's argument was that there is now a *bona fide* dispute on the debt as the petition failed to take into account the payments made by the respondent. It was contended that by accepting the sum of RM20,000 from the respondent on 20 March 1998, the petitioner had waived its right to insist on the scheduled installment payments under the settlement agreement. The petitioner is now not at liberty to insist on the strict performance of the settlement agreement.

The respondent also raised a procedural objection to the legality of the petition in that the affidavit verifying the petition was not filed within four days as required under r. 26 of the Companies (Winding-Up) Rules 1972, which read as follows:

> 26. Verification of petition
>
> Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be *prima facie* evidence of the statements in the petition.

The petition was filed on 13 March 2001. But the affidavit was only filed on 30 May 2001 – some two and a half months overtime from the required four days. No reason was proffered by the petitioner for the delay.

The objection itself is on firm ground. Inevitably, a winding-up petition against a company exposes it to some undesirable consequences. First and foremost, its goodwill may be adversely affected. Secondly, its operative function will be impeded. As Walter Woon in his book *Company Law* 2nd edn, wrote at p. 684:

> The presentation of a petition for the winding-up of a company does not mean that the company is in liquidation from that date. However, the date of the presentation of the petition is significant, because if a winding-up order is made the winding-up is deemed to have commenced at the time that the petition is presented. During that twilight period between the time the petition is presented and the time it is heard, the company is in limbo, hovering as it were between life and death. Until the court has made a winding-up order, it is not certain that the company will go into liquidation. Yet the possibilities of a winding-up order remains, and in that event the commencement of the winding-up is backdated to the time of the presentation of the petition. Certain transactions that have been entered into after the presentation of the petition may be affected *ex post facto* if a winding-up order is made.

Time, therefore is of the essence in the filing of the verifying affidavit which explains why r. 26 provides that it shall be filed within four days after the filing of the petition. The longer the petitioner takes to complete his petition, the more the detriment to the respondent. The delay of two and a half months on the part of the petitioner, it is quite clear, has caused some injustice to respondent and should not therefore be condoned under r. 194.

On this procedural ground alone, the petition ought to be disallowed.

But there is also substance in the respondent's averment of a *bona fide* dispute on the sum of RM512,094.56 now being claimed by the petitioner. By accepting the sum of RM20,000 in 1998 from the respondent, it is now open to the respondent to argue that the petitioner may have waived his right under the settlement agreement to insist on the strict performance of the respondent's obligation under that agreement, the effect of which may deprive the petitioner of the right to claim the original sum of RM512,094,56. A waiver (which does not require consideration) operates as an estoppel to deny the petitioner of that right. The principle can be gleaned from *Chitty on Contracts vol. 1 General Principles* 28th edn at para. 23-039:

> **Waiver or forbearance.** Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.

The respondent need not prove its case conclusively that there had been a waiver on the part of the petitioner in this petition. All that it needs to show in this forum is that there is a *bona fide* dispute on the debt now being claimed by the petitioner by reason that the petitioner may have waived his right to claim the sum it is now claiming. To that extent I am convinced, the respondent has succeeded. The submission of counsel for the petitioner on the merit as to whether a waiver is operative under the circumstances is therefore quite irrelevant.

The law in this respect is adequately summarised by the advisory editor of *Companies Winding-Up Handbook (MLJ Handbook Series)* Alex Chang Huey Wah at p. II 76:

> **Disputed debts**. A company has not 'neglected to pay' the debt if the debt is disputed on substantial grounds; see *Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd* [1985] 1 MLJ 84 (HC). A winding-up petition is not an appropriate

means of collecting a disputed debt. It must not be used to bring improper pressure to bear on a company. The proper course is to have the matter adjudicated upon in an action for debt. See *Re Lympne Investments Ltd* [1972] 2 All ER 385; *Long Yick Realty Co Sdn Bhd v. Asia Commercial Finance (M) Bhd* [1994] 2 MLJ 308; *NKM Development Sdn Bhd v. Irex Sdn Bhd* [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 56; *Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58; *Sun Soon Heng Coach Works Sdn v. Nima Travel Sdn Bhd* [1986] 2 MLJ 374, [1986] 1 MLJ 252; *Re Laceward Ltd* [1981] 1 All ER 254.

The petitioner should first have his claim adjudicated upon in an action for debt whereupon it would then be open to the parties to ventilate at length whether or not the doctrine of waiver applies – in short whether the petitioner is entitled to claim the sum of RM512,094.56. Only after having obtained a judgment on the sum claimed should it then proceed to institute a petition to wind-up the respondent.

The petition is dismissed with costs.